United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1421

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee

v.

JACK NATHAN,
Appellant

On Appeal from the United States District Court for the Southern District of New York

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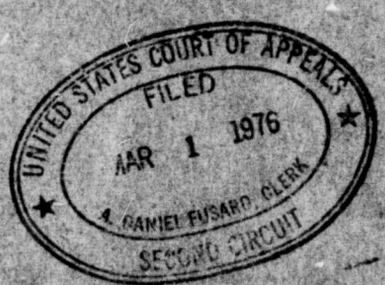
BRIEF FOR APPELLANT



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ON APPEAL FROM THE UNITED STATES DISTRICT
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BRIEF FOR APPELLANT

PRELIMINARY STATEMENT

This is an appeal from a judgment of conviction entered on December 8, 1975, on four counts of an indictment, entered originally in ten counts, charging the defendant with tax evasion in violation of 26 U.S.C. §7201 during the years 1967 to 1970. The defendant was found guilty after

a trial by jury presided over by the Hon. Dudley B. Bonsal. The defendant was sentenced to serve concurrent nine-month prison terms and to pay a fine of $10,000 on each of the four counts, for a total of $40,000.

QUESTIONS PRESENTED

1. Whether there was sufficient evidence of the elements of the offense of tax evasion -- particularly the requirements of knowledge and specific intent to evade taxes -- to warrant submission of this case to the jury.

2. Whether the trial court erroneously refused to permit the defense to cross-examine a prosecution witness by reference to a tape recording in which the witness had admitted submitting a false sworn statement to the IRS.

3. Whether the trial court in its initial and supplementary instructions, erroneously refused to charge the jury on a theory of defense supported by the evidence.

4. Whether the trial court erroneously admitted into evidence and failed to provide adequate cautionary instructions regarding hugh prosecution charts relating to facts not at issue.

5. Whether the trial judge's sua sponte interruptions, remarks and erroneous characterizations during the cross-examination of prosecution witnesses made him a partisan on the side of the prosecution.

6. Whether the trial court erroneously took a partial verdict and erroneously refused to poll the jury before it was finally dismissed.

STATEMENT

Introduction

This appeal is of a kind described by this Court as "rather unusual these days in that [the defendant] claims he was innocent of the crime charged." United States v. Miller, 381 F.2d 529, 531 (2d Cir. 1967), denial of motion for new trial reversed, 411 F.2d 825 (2d Cir. 1969). The defendant is a 64-year-old businessman, with no prior involvement of any kind with the law, who has been found guilty of evading income taxes for the years 1967 through 1970 in an average amount of less than $8,000 per year.

The litigated issues at Mr. Nathan's trial were whether he had knowledge of his accountant's errors on his tax returns and whether certain funds were used for business purposes. The critical witness at the trial was the accountant, who had been given full responsibility over the books and tax returns for the years in question. Although the accountant was called as a government witness, his testimony exonerated Mr. Nathan and indicated that the errors on Mr. Nathan's tax returns were attributable to the accountant's carelessness. Nor was there any other direct or probative circumstantial evidence that Mr. Nathan had knowledge of these errors. In place of evidence, the prosecution relied on

speculation, which became credible to the jury only because the two business practices that gave rise to these errors were unconventional. Mr. Nathan,however, is in the collection business, an extraordinarily difficult and unconventional line of work.

The first practice upon which the prosecution relied was that the business kept outstanding checks on the books even though they had not been cashed by the end of the calendar year or after six months. As we shall show, however, there was no legitimate basis whatsoever for the jury to infer from this practice by Mr. Nathan's accountant that Mr. Nathan was attempting to evade taxes. The second practice upon which the prosecution relied to support its charge of tax evasion was that Mr. Nathan drew checks to three leading hotels in New York City that were clients of his firm and personally negotiated these checks for cash at the hotel. Mr. Nathan testified before the grand jury that the cash received for these checks was used for business purposes, a position supported by circumstantial evidence in the record, and one for which the prosecution provided no contrary evidence whatever. In any event, there is no basis for attributing to Mr. Nathan any knowledge of how these checks were treated on the firm books by his accountants.

The government's entire case was based on these two practices, which Mr. Nathan's firm followed openly and continuously throughout the tax years in question. In spite of the high level of proof consistently demanded by the courts in tax evasion cases, Mr. Nathan was thus convicted solely on the basis of conjecture and surmise. And in spite of the small amount of taxes involved and the thinness of the government's case, he was sentenced to nine months imprisonment and a $40,000 fine, an extraordinarily severe sentence for a first offender. We invite this Court to review the facts of this case carefully; upon close scrutiny, the weakness of the government's proof is manifest, and the Court can only conclude that an injustice has been done.

Our brief argues first that under the applicable standards, the evidence introduced at trial required the entry of a judgment of acquittal at the conclusion of the prosecution's case. Although Mr. Nathan had appeared voluntarily, at his request, and testified before the grand jury which indicted him, no defense was offered at trial as a tactical decision by defense counsel.

We argue, alternatively, that a variety of trial errors during the short proceedings below combined to render Mr. Nathan's trial totally unfair. Each of these errors individually would warrant reversal and remand for a new trial. But when they are taken together, and when they are cumulated with the exceedingly slim evidence of guilt, a new trial is the least that fairness and justice require.

1. Mr. Nathan's Business

The defendant operates a family-owned collection agency which does business in New York City under the corporate name of Nathan, Nathan and Nathan, Ltd. (A. 243). The agency collects delinquent accounts--i.e., amounts owing for more than 90 days--for hotels, airlines, restaurants, and other commercial establishments. It usually receives a standard 35 percent commission for its services. Most of the agency's collections are paid directly to it, and it remits the proceeds--less the commission--to its clients. When debtors contacted by the agency pay the client directly, the agency bills the client for the commission on the amount recovered (A. 181-183). Among Mr. Nathan's clients were leading New York City hotels such as the New York Hilton, the Park Sheraton, the Waldorf-Astoria, and the St. Moritz

(A. 181, 212-213, 227). During the years in question, the firm made collections averaging about $500,000 a year (A. 392).

2. How the Business Was Run

Mr. Nathan conducted his family business in a highly individualistic manner. Sanford Katz, the accountant who did his work between 1967 and 1970 and who testified as a prosecution witness said that he knew, from first-hand observations, that Mr. Nathan was obliged to do many things at one time. He would spend considerable time visiting prospective clients in an effort to obtain business, and he would meet regularly with his current clients to discuss particular collection problems (A. 360). He described Mr. Nathan's response to the request he keep a diary by noting that "[t]he nature of the business is so dynamic that it is virtually impossible to record in a diary fashion what goes on during a business day" (A. 299). The accountant summarized what he saw (A. 362):

> [I]n my own relationship with the client, when I was trying to have conversations with him and discussions they were very often interrupted by phone calls, by running downstairs to an emergency or a crisis or running out of the office to take care of some immediate problem and many of my own conversations were not even followed through or finished or

> left hanging, so he didn't have to explain to me that he was always running because I observed it first-hand.

The checkbook was kept by a secretary named Beatrice Carrasquillo. Between 200 and 400 checks would be issued by the firm each month to its clients, employees and others, and these would be made out and mailed by Miss Carrasquillo (A. 393, 427-428). The checks would be signed by Mr. Nathan, and occasionally he would make the entry on the stubs in the checkbook (A. 449).

All bookkeeping was done by an accountant hired to keep the firm's financial records. The accountant would come in weekly, and would find the documents for his work in a drawer. Katz described the standard operating procedure as follows (A. 336; see A. 270):

> The practice was to put notices from the government, from the various governments, federal, state, and city, other information from banks, interest statements, anything that might pertain to a financial nature for either Mr. Nathan or the firm into a drawer. The only thing that I recognize is that things were just thrown in, they were not filed in. They were just thrown into the drawer and I would lift it out and examine it and see what pertained to me and what didn't.

The financial records were kept entirely by the outside accountant. Katz testified that he was retained in

April 1966 to do the same work that had been done until the end of 1965 by another CPA named Isidore Dunst, and then, for a few months, by one Allan Edwards (A. 242-244, 320-321). The firm's cash disbursements journal and other books were based upon the bank statements and checkbook, from which the cash disbursements journal, cash receipts book, and other records were written up by the accountant (A. 103-104, 107, 247-248). Mr. Nathan advised both Edwards and Katz that he wanted to continue with the procedure that Dunst had followed, under which the keeping of the proper financial records from these sources would be the exclusive responsibility of the accountant (A. 106, 151-152). Katz testified (A. 371-372):

> Q: Mr. Nathan never instructed you on how to make entries in the books, did he?
>
> A: No.
>
> Q: To your knowledge, he never instructed anybody about what should or should not go in the books?
>
> A: That's correct.
>
> Q: That was a function that Mr. Nathan left to you?
>
> A: Correct.

Any financial forms which had to be filed with government agencies by the business or by Mr. Nathan personally

were completed by the accountant and submitted to Mr. Nathan for signature. Mr. Nathan did not become involved in any details of the return but would, at most, "question the bottom line" (A. 387). In fact, Katz testified that he submitted so many forms to Mr. Nathan for his signature that he was able to conceal from him that he had fallen behind in preparing the corporate tax returns and had never filed them. "[H]e had signed so many papers he didn't realize what he had signed" (A. 488).

3. The Unnegotiated Checks

The first of the two groups of "specific items" which the prosecution claimed constituted a scheme to evade taxes between 1967 and 1970 related to the fact that there were, among the 200-400 checks written by the firm each month, a monthly average of less than 6 in 1967 (for a total of 70) and less than 5 in 1968 (for a total of 56) which never cleared Nathan, Nathan and Nathan's bank account.[1/] These checks (set out in a large chart that was introduced as Government Exhibit 338, A. 679), ranged widely in amount. Of the 70

1/ There was no proof as to the reason why these checks were not negotiated. Some were in such obviously small amounts that the payees simply may have ignored them. As to others, substitute checks subsequently may have been written.

such checks in 1967, 33 were for amounts of $50 or less, and 10 were for less than $10.[2/] Two--both to the Thunderbird Hotel--were in amounts exceeding $1,500. For 1968, 22 of the 56 were for less than $40, and 5 were for less than $10. Two were in amounts between $1,000 and $1,500 ($1,243.69 and $1,445.79) and two exceeded $3,000. Since the firm's books were drawn on the basis of expenses as shown on check stubs, these checks were originally placed on the books as expenses and were not reversed by the time of the indictment.

a. Edwards' Testimony Concerning Unnegotiated Checks

The prosecution's evidence was that Dunst, the accountant before 1966, had kept outstanding checks on the books even though they had not been negotiated by the end of a calendar year or six months later. Edwards, who was retained in

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2/ Most of the checks were to hotels, but a few were to individuals or to other business establishments. The checks were, by and large, in odd amounts, such as $4.61, $37.76, $78.55, etc.

early 1966, testified that he had talked to Mr. Nathan about various flaws he found in Dunst's work, among which was the fact that Dunst had kept on the books checks issued in 1963 and 1964, totalling more than $8,000, that were over one year old (A. 111). He testified that he told Mr. Nathan that these checks, if negotiated, would give the firm a negative bank balance (A. 112).[3/] He also testified that he told Mr. Nathan that unless the old checks were voided and the funds reflected as additional income or new current checks were issued, he would not be able to prepare the tax returns for 1965 (A. 113). This testimony was contradicted by the fact that his letter to Mr. Nathan of March 1966 stated that the tax returns had been "prepared and ready to be sent out as of February 4" (A. 652). On direct examination Edwards testified that after the conversation on this subject with Mr. Nathan, Mr. Nathan "didn't give me an affirmative answer" (A. 122). On cross-examination he also said that "Mr. Nathan refused to give me a definitive answer of what I should do" (A. 156).

3/ Edwards identified a letter that he had written to Mr. Nathan in March 1966, and the letter was introduced as Government Exhibit 3 (A. 652). The next-to-last paragraph is the only one that refers to the "cash overdraft," and it implies that the reason for the overdraft was that many checks were written at the end of the year and funds were not deposited until the first week of January. The letter makes no specific or implied reference to any outstanding or stale checks.

Edwards testified that after these discussions with Mr. Nathan, during which he was also requesting other forms of documentation from Mr. Nathan and quarreling over the size of his bill,[4/] he had further correspondence relating to an extension for filing the tax returns and discussing the time when he or his employees would be at the firm "to complete the February work" (A. 125-126). During the last week of March, Mr. Nathan told Edwards that he would be replaced by another accountant (A. 126-127). Thereafter he turned the papers relating to Mr. Nathan's accounts over to Sanford Katz (A. 127-128). On cross-examination, Edwards admitted that Mr. Nathan had told him he was being discharged because he was "using juniors" instead of personally doing the work and because he was "asking for extensions" contrary to Mr. Nathan's wishes (A. 155).

b. Katz' Testimony Concerning Unnegotiated Checks

Katz testified, on cross-examination, that when he was first retained there had been a meeting between himself, Edwards and Mr. Nathan, and that in this meeting Mr. Nathan

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4/ The longest paragraph of the letter of March 1966 that was introduced in evidence dealt with the matter of accountants' fees and constituted a justification by Edwards of the fees he had charged (see Government Exhibit 3; A. 652).

had complained that Edwards had sought an extension on the filing of personal tax returns and Mr. Nathan had "also protested the type of people sent to his establishment by Mr. Edwards." Mr. Nathan had then fired Edwards and retained Katz, who had been given the accounting records by Edwards (A. 323-325). Edwards thereafter told Katz that he did not "get along with Mr. Nathan personally" and was glad not to be doing his accounting work (A. 325).

Katz testified that he began working on the books after he was retained and that he prepared the tax returns for 1965. He testified that there were outstanding checks on the books issued in 1963 in the amount of $5,310.56 and in 1964 in the amount of $3,119.12 (A. 277-274). These checks continued to be reflected as expenses by Katz when he filed returns for the firm for 1967 and 1968 (ibid.).

Katz testified that the matter of outstanding checks was mentioned to Mr. Nathan on only three occasions:

(i) 1966--Sometime in 1966, Katz said he mentioned the outstanding checks "and asked about them." Mr. Nathan replied "that checks sometimes do clear months and months after they are issued; that this is not that unusual a phenomenon, and that the instructions with the bank are such

that no check is ever to be dishonored because the viability of the credit or the standing of the firm would be affected if any check was sent back for any reason" (A. 287-288).[5/] Katz further testified that thereafter, when he was preparing bank reconciliations for the fall of 1966, he "came across several checks on numerous occasions, checks that were anywhere from six to ten to twelve months old and they were accepted by the bank without the usual practice of a notice" (A. 364). Katz' testimony was substantially the same on redirect examination (A. 461-462).

(ii) October 1971--In August 1970, the IRS notified the firm that an audit would be conducted, and Mr. Nathan told the IRS agent to handle the audit with Katz (A. 305-306). Katz had concealed from Mr. Nathan the fact that, because of

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5/ On Katz' redirect examination, the prosecutor questioned him about grand jury testimony in which he had described the meeting with Mr. Nathan, Edwards and Katz as "hostile" and "antagonistic." Katz had testified before the grand jury that Mr. Nathan had stated at that time that he had an outstanding order at the bank to honor stale checks because "these checks clear much later" (A. 413). At trial, however, Katz testified that he had been mistaken before the grand jury in that Mr. Nathan discussed the problem of the stale checks not at that meeting with Edwards but "several months later" (A. 415). Katz testified that Edwards had mentioned outstanding checks in the cab ride they took alone back to Edwards' office to obtain the records, but that Katz did not then understand what Edwards was talking about (A. 414). Edwards did not recall any meeting, nor did he even remember whether he gave Katz the records personally (A. 126-127).

personal problems, he had fallen 12 to 18 months behind in his work and had not filed the corporate tax returns for the firm (A. 370). Katz admitted that to cover up his own delinquency, "I prolonged the audit and the audit was dragging" (A. 306). Mr. Nathan, still ignorant of the fact that no corporate returns had been filed on time, finally retained another CPA, Joseph Katzman, to assist Katz during the audit (ibid.; A. 375). In an early meeting with the IRS agent, Katz had produced bank reconciliations which reflected the outstanding checks and answered the agent's questions relating to those checks (A. 373-374). Approximately five or six months after this discussion with the agent--after Katzman had been brought in by Mr. Nathan--there was a meeting between Katz, Katzman and Mr. Nathan during which the subject of the outstanding checks was discussed. Katz testified, on cross-examination, that Mr. Nathan's instruction to the two accountants at this meeting was (A. 375); see also A. 328):

> Do whatever is necessary in order to put everything in order.

(iii) November 1971--Shortly thereafter, Katzman told Mr. Nathan that Katz had never filed the corporate returns, and Mr. Nathan immediately met again with the accountants.

They reviewed the matter of the delinquent returns, and Katz agreed that he would put everything else aside to bring the books up to date (A. 377-379). The specific subject of the outstanding checks was not discussed (A. 379-380). Three or four weeks later, in approximately November 1971, the delinquent returns were being prepared, and the accountants met again with Mr. Nathan. By that time, Katzman had proposed to the IRS agent that the appropriate method for dealing with such old checks as were still unnegotiated was to write them off after a lapse of five years.6/ He made this suggestion to Mr. Nathan, who replied (A. 380):

> [D]o what has to be done; whatever has to be done, I don't understand what you two are talking about.

6/ Katz testified that in approximately August 1971, at the conclusion of a meeting with the IRS agent, the following occurred (A. 382-383):

> As we were adjourning the meeting and setting an appointment for another meeting Mr. Katzman brought up the question to Mr. Kerr about the advisability of a periodic writeoff, every fifth year to write off one of the years. Mr. Kerr stated to him that he was in no position to either give a ruling or even to comment on this, considering that he would have to present anything like this to his supervisor or superior or group chief or something like that and that he would talk to him further about it. This was the only time that Mr. Katzman mentioned it, at the end of that meeting and then we were going to discuss it further at a subsequent meeting.

Although Katz disagreed with Katzman's proposal and believed that all checks that were more than 12 or 13 months old should be written off, he completed the 1969, 1970 and 1971 returns according to Katzman's suggestion. Consequently, on the 1969 return, which was filed in December 1971, the remaining outstanding checks written in 1963 and 1964 were added to income. On the 1970 return, filed at the same time, the still unnegotiated checks written in 1965 were added to income. And on the 1971 return, the stale checks written in 1966 were reflected (A. 308, 383). No criminal charge was based upon any of the years written off in this manner, but similar unnegotiated checks issued in 1967 and 1968 became part of the charge that tax had been evaded for personal and corporate returns covering those years.

c. Katz' Explanation

Only on cross-examination was Katz asked directly why he had not written off the unnegotiated checks (A. 368-369):

> Q: Mr. Katz, why didn't you write those checks off after they didn't clear in 1966?
>
> A: Why didn't I?
>
> Q: Yes.
>
> A: I just left them on the books and carried them.

Q: Did you do that because the prior accountant, Mr. Dunst, had done it?

A: Yes. Basically.

Q: Didn't you think by that time more than eight to nine months had elapsed and that the checks should have been written off?

A: What did I do at the time or what do I think now?

THE COURT: I think he is asking you at the time.

Q: First let's talk about at the time and then let's talk about now, if I may, your Honor.

THE COURT: Okay. First at the time.

A: I don't know exactly what I thought at the time. I probably thought that they would never clear because there was very little movement on the checks. I think none getting into '67 or the end of '66. I never broached the subject again, I just went by rote and kept working the same way that I always had without coming to grips with the problem of what to do with the checks.

Q: You had a personal problem in 1965, I think. You lost your child, didn't you?

A: Yes.

Q: And subsequently your wife became mentally ill as a result of it?

A: Ill, yes.

Q: Did that personal problem in any way affect your monthly or daily or weekly or whatever it was duties at the Nathan firm?

A: Well, it affected my duties all over, not only at the Nathan firm.

4. The Cashed Checks

The second of the two groups of "specific items" on which the prosecution relied for its tax-evasion allegation concerned a practice totally unrelated to the matter of the unnegotiated checks. No evidence was offered on this subject by Edwards, and the only proof relating to this aspect of the case came from Katz and the credit managers of three leading New York hotels.

a. Background--As has previously been indicated, Katz testified that Mr. Nathan spent much of his time visiting clients and handling other emergency situations. Katz suggested to Mr. Nathan that he keep a diary of his activities and the expenses involved in "running around" to see his clients (A. 298-299). Mr. Nathan had replied that the nature of the business was so "dynamic" that it was difficult "to even keep a record of running around and phone calls and people he is seeing" (A. 299). Katz admitted that from his

own observation of Mr. Nathan's activities--"that he was always running"--he understood that it was difficult to keep such a diary (A. 362-363). No specific documentation or clarification regarding miscellaneous expenses of the business was available in the checkbook, and a consequence was that the tax returns showed travel and entertainment expenses for 1967 of only $810.18, for 1968 of only $1,678.15, and for 1969 of only $1,307.31 (Government Exhibit 6). Katz testified that from his reading and experience as an accountant, a collection firm is expected to have travel and entertainment expenses ranging between 10 and 15 percent of gross receipts (A. 347). On the firm's 1967 gross collections, Katz testified, a reasonable allowance for travel and entertainment would have been between $40,000 and $65,000 (A. 349). Even if the 10-15 percent figure is applied to the gross profit, on the average annual gross profit of approximately $200,000 which the Nathan firm was making, between $20,000 and $30,000 would be the expected expense in the travel and entertainment area.

b. The Practice of Cashing Checks--It was undisputed that Mr. Nathan would regularly have firm checks drawn to one of three leading hotels in New York City that were clients of the firm and would personally negotiate these checks for cash at the hotel after receiving the initialed approval of the

hotel's credit manager or his subordinate. As is more fully outlined below,[7/] there is a strong basis in the record for concluding that these funds were used for business purposes.

The amounts of the cashed checks ranged between $100 and $600, and they were drawn and endorsed at irregular intervals--averaging less than three checks per month. The number of such checks in 1967, 1968 and 1969 were 33, 29 and 32 respectively (Government Exhibits 31-145, 337; A. 654-658, 674). Nearly all the checks showed, by their endorsements and other stamps on the back, that they had been negotiated for cash. All were made out to the order of the hotels rather than to "Cash" because, as the credit managers testified, it was their policy to instruct cashiers and customers only to draw such checks to the hotel directly (A. 191,218-219, 226).

c. The Credit Managers' Testimony--Although it had never been disputed that the enumerated checks were negotiated for cash at the three hotels, the prosecution presented the testimony of the three credit managers to establish this fact. The first of the managers, Leonard J. Groppe, who had

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7/ Mr. Nathan volunteered to testify before the grand jury and stated there, under oath, that the cash he received when these checks were negotiated was used for business purposes (A. 41,56). He admitted that he did not keep a daily record of cabfares or ask for receipts after entertaining clients, explaining that it would have been embarrassing (ibid.).

been with the St. Moritz since 1945, testified, in addition to the matter of Mr. Nathan's check-cashing, that he had occasionally received money, in the form of checks, from Mr. Nathan at Christmastime (A. 186). He denied receiving gifts at any other time, and testified that in 1968 he had been paid money because he had done collection work for Mr. Nathan on Long Island (ibid.).[8/] Groppe also testified that Mr. Nathan's practice of cashing checks at the hotel dated back to 1947 or 1948 (A. 189).

Groppe said that Mr. Nathan would come to the St. Moritz for lunch with him about every two months, but that the lunch would not be paid for by Mr. Nathan but by the hotel (A. 187). On cross-examination, Groppe admitted that he had signed an affidavit stating that Mr. Nathan had entertained him "at various times" (A. 194-195). He also testified that he saw Mr. Nathan entertaining other people at the St. Moritz "quite frequently," and admitted that this entertaining was not paid by the St. Moritz (A. 196).[9/]

8/ This testimony was false, but--as we indicate below--the defense was not permitted to refute it in the most probative form possible--i.e., playing to the jury a tape recording of Groppe's voice admitting that the statement was false. See pp. 50-58 , infra.

9/ The effort to impeach Groppe with the recorded statement squarely inconsistent with his trial testimony is fully recounted in the relevant section of our Argument, pp. 51-55, infra.

The New York Hilton's credit manager, Lawrence E. Carey, testified about the check-cashing practice, and stated unequivocally on cross-examination that it was the hotel's policy to require that checks to be cashed be made out to the hotel rather than to cash (A. 218). Carey also testified that, as credit manager, he made the initial choice of which collection agency the hotel should use, and he admitted being entertained by Mr. Nathan "on one occasion" and meeting with him to discuss "problems" with the accounts (A. 221). He also testified that he saw Mr. Nathan entertain others at the New York Hilton (ibid.).

Joseph Mazzurco, the credit manager for the Waldorf-Astoria, admitted that he received cash payments from Mr. Nathan whenever a statement was given to the hotel (A. 227). The amount, he said, ranged between 40 and 100 dollars--and was occasionally as high as 150 dollars--but it was not tied, by any prearrangement, to any particular percentage of proceeds (A. 227-228). He testified that he also received whiskey from Mr. Nathan around the holidays (ibid.). In response to cross-examination, Mazzurco testified that in the collection business it was a "practice" or "custom" for credit managers to receive cash gratuities from collection agencies,

and that this "practice" or "custom" was followed by the other agencies (approximately half a dozen) with whom he did business (A. 235-236, 238-240).

d. Katz' Testimony Concerning the Cashed Checks--Katz direct examination was devoted principally to the matter of the unnegotiated checks. Of more than 70 trial transcript pages of Katz' direct testimony, only 5 related to the check-cashing procedure. Katz testified that, acting entirely on his own, he charged the amounts shown by the cashed checks on the firm's books as if they were "refunds" or payments to the hotels of amounts owing to them from collections (A. 297). He testified that Mr. Nathan had not told him that he was cashing checks at the hotels or that he was making cash payoffs to the credit managers of the hotels (A. 298, 317). He also testified--as we have previously noted--that he had asked Mr. Nathan to keep an expense diary or to label, on the check stubs, the purpose for which each check was written (A. 298-299).

On cross-examination, Katz explained how he had committed the mistake of erroneously classifying the cashed checks (A. 351-355):

> Q: . . . With respect to the checks that were cashed at the hotels, you testified yesterday that you classified those checks which were made payable

to the four hotels in 1967, 1968, 1969 and '70 under a column in the cash disbursements ledger as refunds. Do you recall that?

A: Journal.

Q: I beg your pardon? Oh, you call it a cash receipt.

A: Journal.

Q: I'm sorry, I stand corrected. Now, will you tell us again why you had that?

A: Right. The majority of the checks written by Nathan, Nathan & Nathan Limited involved refunds or remittances to clients. Most of the checks were written to hotels, airlines and various establishments, but mostly hotels and airlines. So by the nature of the stub book from which the entries were derived and no information being written in the stub book, all checks made out to these hotels and airlines were classified as payments to customers or clients and they were put into refunds.

Q: What you are telling us, in other words, is that these four hotels who were clients of Nathan, Nathan & Nathan Corporation would receive remittances from Mr. Nathan's firm on collections made from debtors?

A: Yes.

Q: And these cash checks were likewise made out to these same four hotels, isn't that right?

A: Right.

Q: And you were under the impression that they were refunds and, therefore, you put them under the refund column.

A: Yes.

Q: I think you told us that the effect of that was to create an expense for those checks.

A: Yes.

Q: On the tax return, because what you had was you subtracted the checks refunded to the client that were received from collection from the gross receipts, is that right?

A: Yes.

Q: So the net effect was that you charged up these expense, these cash checks as a deductible expense, is that right?

A: Yes.

Q: Now, the reason you did that, you say, is that you had not looked at the back of those checks, isn't that right?

A: That's correct.

Q: Had you looked at the back of those checks and seen that they were cashed at the hotel you would have treated them differently?

* * * * *

THE COURT: Let's leave it that the witness did not look at the back of checks. That was the question, you assumed that these were in the nature of the refunds, which were not refunds at all, but were payments made to the hotel in connection with the collection business, is that right?

THE WITNESS: Yes.

Q: Now, had you looked at the checks and seen that they were stamped cashed or okayed for cash with Mr. Nathan's initials on it, how would you have treated those checks on the books?

THE WITNESS: I'm supposed to answer that, right, your Honor?

THE COURT: Yes, if you can.

A: I would have discussed it with the client, would have asked him what the nature of the check was and why it was written and I would have classified it, I hope, as travel and entertainment.

* * * * *

Q: So that actually, accepting your latest statement, then instead of entering those cash checks as refunds you would have entered them under the column in the books T and E?

A: Right, or a similar expense account having been explained what the nature was for.

Q: And the net effect would be the same on a tax return, that would be a deductible expense in your opinion as well as if it had been a refund, isn't that right?

A: Yes.

Q: Now, having looked at the back of the checks there is no question in your mind that you misclassified those checks as refunds, isn't that right?

A: That's correct.

Katz also testified that he heard Mr. Nathan instruct Miss Carrasquillo, his clerk-secretary, to put more meaningful notations in the checkbook stubs (A. 359-360). He also testified that he knew that "refund" checks to clients were usually mailed out "as close as possible" to the first of the month and would "normally" be dated on the last day of the preceding month (A. 395-396). When asked what he had told the prosecutors, Katz replied that he had told them that he had "misposted or placed in the wrong column the checks drawn to the hotels" (A. 400), and that the prosecutors had indicated that his testimony was "implausible" (A. 403).[10/]

10/ On redirect, Katz stood by his testimony (A. 423-424):

> Q: If Mr. Nathan had told you at that time that he was cashing these checks, these checks made out to hotels that I believe you talked about on cross-examination--
>
> THE COURT: I think I would rephrase that question and put it on the basis if you had known at the time you were doing this that a number of these checks payable to hotels were being cashed at the hotels, what would you have done about it.
>
> THE WITNESS: I would have asked Mr. Nathan what the cash was being used for. If he told me for entertainment, I would then place it in the entertainment column, probably with a warning or advice that they have have to be substantiated.

(continued on next page)

5. Investigation, Indictment and Trial

In August 1970 an IRS audit began. During the first year of this audit, Mr. Nathan was unaware of the fact that Katz had fallen behind in his work and had not filed the corporate tax returns for 1969 and 1970 (A. 302-305). He first learned this fact shortly before the delinquent returns were filed in December 1971.

Joseph Katzman was retained by Mr. Nathan in about October 1971 to assist Katz with the audit (A. 88). As a result of discussions among Katz, Katzman and the examining IRS agent, a man named Kerr, the accountants believed that they had resolved the matter of the unnegotiated checks by agreeing to file corporate tax returns that would write the checks off and bring the amounts into income over a period of years (A. 87, 382). It was at this time,

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10/ (continued)
And on recross (A. 486):

> Q; With regard to the cash checks, as I understand it you testified not that they were misposted, but that you had misclassified them, isn't that right?
>
> A: Yes.
>
> Q: In other words, as you later learned looking at the back of the checks they should have been put under T and E instead of refund.
>
> A: Yes.

according to an affidavit submitted by Katzman (and according to Katz' testimony (p. 18, supra)), that Mr. Nathan was advised how the unnegotiated checks would be carried on subsequent returns (A. 87). On his accountants' advice, Mr. Nathan paid approximately $80,000 to the IRS, as demanded, for back taxes (A. 79).

By late 1973 and early 1974, it became apparent, however, that the IRS would be seeking criminal prosecution of Mr. Nathan. In a sworn statement, Katz admitted that he was fully responsible for the accounting errors. In addition, Katz made an oral admission to the same effect which Mr. Nathan had tape recorded. Acting on his own, Mr. Nathan visited the Assistant United States Attorney in charge of the case in March 1974 and asserted his innocence. He then accepted the prosecutor's invitation to testify before the grand jury on the understanding that the exculpatory information he was providing--specifically two tape recordings and affidavits of Katz and Katzman--would be presented to the grand jury in conjunction with his case. The Assistant United States Attorney agreed,and Mr. Nathan appeared before the grand jury on April 4, 1974, and was thoroughly questioned (A. 12-66).

The exhibits he submitted were not, however, shown to the grand jury in conjunction with his testimony. After Mr. Nathan was indicted and his counsel indicated he intended to file a

motion requesting dismissal of the indictment because of the broken promise, the United States Attorney's Office reported initially that it could find no indication that the submitted material had been shown to the grand jury (A. 9). After the motion was filed, the prosecution discovered that on April 11, 1974--the day the indictment was returned--the Assistant United States Attorney had appeared before the grand jury and made a statement "for the record."[11/] After advising the grand jury (erroneously, we believe) that Katz' tape recorded statement was "not evidence before this Grand Jury and couldn't be evidence," the prosecutor proceeded to read a submitted transcript of a portion of one tape and an affidavit by Katzman and two by Katz (A. 83-84).

On the same day, Mr. Nathan was charged in a ten-count indictment, which was thereafter superseded and joined with the indictment on which he stood trial.[12/] His motion to dismiss the indictment based upon prosecutorial misconduct was reserved by the trial judge until after the trial and was denied at that time, with the trial judge also denying a request for an evidentiary hearing (A. 703-704).

11/ A letter from the United States Attorney's office to defense counsel advised that the reason for the oversight was that "since no witnesses were presented before the Grand Jury on April 11th, Mr. Putzel's statement was not indexed under United States v. Nathan."

12/ The indictment in the form it went to the jury appears in the Appendix (A. 4-6).

ARGUMENT

Introduction

This is an unusual case, not only because, as we have previously noted, the defendant has steadfastly maintained his innocence from the inception of a criminal investigation to the present, but also because he has been found guilty of tax evasion not on affirmative proof, but entirely on evidence of what he allegedly did not do. The evidence pertained to two totally unrelated business practices, employed by the defendant in his distinctive business, and as to neither of them did the prosecution show a single act of misconduct of the kind that would establish deliberate tax cheating or even consciousness of guilt. On the first discrete branch of the prosecution's case--the unnegotiated checks--there was no proof whatever of any irregularity with respect to the issuance of the checks. All the checks were mailed in due course and received in due course. So the defendant faces a jail sentence not for instituting any scheme to cheat the revenue or for taking any active steps to achieve such an illegal objective, but for failing to overrule the consistent and knowing practice of an accountant he had retained until the end of 1965 and for failing to direct his new accountant, retained in late March 1966, to reverse

that practice, which the new accountant regarded as reasonable and acceptable. On the second aspect of its case, the prosecution adduced not a scintilla of affirmative proof. It did not introduce any evidence suggesting that the defendant had knowledge of how the cashed checks were being treated on the corporation's books or that he told the accountant where to classify those checks or otherwise deliberately misled him. Nor was there any evidence whatever that the defendant used the cash received from the negotiated checks for personal purposes. The prosecution proved only that Mr. Nathan did not tell his accountant that he was cashing the checks or giving gratuities to credit managers. But it is undisputed that the accountant never asked, and it is equally clear that, from several obvious earmarks on the very checks which allegedly were being used to conceal cash receipts, the accountant should have known that they were exchanged for cash.

The injustice caused by the submission of this case, to the jury was aggravated by various incidents that occurred during trial. First, a major point in the defense theory was that the funds from the cashed checks were used, in large part, to make cash payments to credit personnel. That point was improperly aborted when the trial judge refused to allow one of the credit managers to be impeached by a tape recording in which he, in substance, admitted receiving such payoffs and when the court refused to give the jury proper instructions on this theory of defense. Second, the jury's attention was diverted from the most important issue in the case--willfulness--by the unguarded use of large, almost irrelevant, charts and by

various indications from the trial judge that he sided with the prosecution.

This Court is now, in every practical sense, the defendant's last resort in his effort to secure justice and a fair hearing for himself. When it appeared that the suspicions against him might lead to a formal criminal charge, he voluntarily sought an appearance, under oath, before the grand jury. The record of that chapter--recounted in our Statement (pp. 31-32, supra)--shows, at best, that he was treated unfairly and, at worst, that the prosecutor broke his promises and tried to use the appearance to bolster an otherwise nonexistent case. The defendant then went to trial--just days after undergoing a painful eye operation (A. 208)--and encountered a proceeding that was rendered unfair by rulings and interpolations of the trial judge. At the conclusion of the prosecution's case, the defendant was advised by his attorney that the proof was so insubstantial that no defense witnesses were needed. The jury--which had heard only one side of the case--was unable to agree on a verdict after many hours of deliberation, and when it finally rendered a partial verdict, it irrationally found the defendant guilty on one set of counts and failed to find him guilty on another set that charged the identical offenses. The trial judge then imposed the extraordinarily severe sentence of nine months' imprisonment and a $40,000 fine--a punishment not justified by the nature or the circumstances of the offense or by the defendant's totally unblemished prior record. It is on this record of frustration and injustice that this case comes here.

I.

THE EVIDENCE OF WILLFULNESS WAS INSUFFICIENT TO WARRANT SUBMISSION OF THE CASE TO THE JURY

A. There was no proof that the defendant committed any act of evasion.

In cases decided more than thirty years ago, the Supreme Court held that a taxpayer cannot be found criminally liable on a charge of tax evasion in the absence of proof "that the acts complained of were willfully done in bad faith and with intent to evade and defeat the tax". United States v. Ragen, 314 U.S. 513, 515 (1942). See Spies v. United States, 317 U.S. 492 (1943); United States v. Murdock, 290 U.S. 389, 396 (1933). This requirement, often cast in terms of "specific intent," requires "some willful commission in addition to the willful omissions that make up the list of misdemeanors." Spies v. United States, 317 U.S. 492, 499 (1943), quoted in United States v. Platt, 435 F.2d 789, 794 (2d Cir. 1970). Or, as the Ninth Circuit put it in a leading case, the Supreme Court decisions prescribe a "sort of wilful wilfulness required in income tax cases." Forster v. United States, 237 F.2d 617, 618 (9th Cir. 1956).

Pursuant to this general rule, the Sixth Circuit said in Lurding v. United States, 179 F.2d 419, 422 (1950), that the filing of an inaccurate tax return may not, in and of itself, be the basis for an inference of willfulness or wrongful intent: "Such filing is unlawful, however, only if made wilfully, with

knowledge of its falseness and with intent to evade taxes. There is no presumption that may be drawn from the act itself--both knowledge and wilfulness must be established by independent proof, direct or circumstantial" (emphasis added). Applying the Supreme Court cases and the decision in Lurding, the Third Circuit reversed a conviction under the predecessor to Section 7201 in a case that was analogous to this one in many respects except that the prosecution's proof was stronger than in this case. See United States v. Pechenik, 236 F.2d 844 (3d Cir. 1956).

Pechenik concerned, as does this case, a taxpayer who relied entirely, in the operation of a family business, on a bookkeeper and an accountant to keep proper records and prepare the necessary tax returns. The prosecution claimed that by "treating capital expenditures as operating expenses," the corporation reported substantially lower net income than it was entitled to. The accountant apparently testified that he had audited the corporation's books and prepared its returns, but that he did not view it as his obligation to go behind what appeared on the corporation's ledgers and to examine invoices underlying the "Purchases Sundry" column of the purchase journal, where the capital expenditures were apparently posted. 236 F.2d at 846. There was, however, at least a "dispute in the evidence" as to whether he was instructed to make only a "limited audit"--a questionable instruction which is not involved in this case. In Pechenik, the taxpayer directed his accountant, once an IRS investigation began, to make available all of the corporation's records, and, the Court of Appeals noted, "[w]hen it became evident that there

were errors, he engaged other accountants and had the corporation's income taxes recomputed by them." Ibid.

In reversing a conviction for tax evasion, the Court of Appeals relied on the following (236 F.2d at 846-847):

(1) "The defendant . . . left the books, bookkeeping and preparation of tax returns to the bookkeeper and the accountant."

(2) "There is no evidence that the defendant interfered with either of them or with the books."

(3) "The bookkeeper testified that the defendant did not give them directions to charge an expense to one item of account rather than to another."

(4) "[The accountant] did not attribute the errors to the defendant or to any directions or information given by the defendant."

(5) "[The accountant's] explanation was that he did not examine the invoices, but these were available. Nothing was concealed. No information was refused."

(6) "It is not suggested that either the bookkeeper or the accountant was a participant in the crime charged."

(7) "This suggestion [that the defendant knew the returns were false] . . . does not arise from the evidence, but rather from unwillingness to believe that the evidence is true."

On this basis, the Court of Appeals ruled that there was inadequate "direct evidence" of willfulness and that "[s]peculation and intuition cannot be substituted for proof." It reached this conclusion notwithstanding proof that the defendant had told a visiting bank official "that the cost of a warehouse had been charged off as an expense."

Each of the above seven affirmative factors is present in this record as well, and they all negate the inference of unlawful knowledge and intent. In addition, this record contains proof from the accountant that explains the errors and assumes fault for them. It follows necessarily from the Pechenik decision that Mr. Nathan was entitled to a directed judgment of acquittal.

The record here should be contrasted with that in United States v. Scher, 476 F.2d 319 (7th Cir. 1973), where the Court of Appeals analyzed, in substantial detail, the proof at trial in light of a similar contention, and that in United States v. Fahey, 510 F.2d 302 (2d Cir. 1974), where the sufficiency of proof of intent to commit tax evasion was considered by this Court. In Scher, a medical doctor engaged, over a three-year period, in the practice of cashing some of the checks given him by patients. This meant that these amounts were never deposited in the one checking account he had. His accountant testified that he drew up the doctor's books and tax returns on a "bank deposits method", and had, thereby, erroneously but innocently overlooked the receipt of more than $35,000 during the three-year period. He said he had never asked for--and therefore had never seen--a receipts journal which contained the names of patients billed and the amounts received. The Court of Appeals affirmed a conviction and distinguished the case from Pechenik on three grounds--none of which applies here:

First, the defendant had taken the stand and the trial judge--who apparently heard the case without a jury--found him

"to be an unpersuasive witness." 476 F.2d at 321-322. The appellate court, citing Dyer v. McDougall, 201 F.2d 265, 268-269 (2d Cir. 1952), found that this disbelief constituted affirmative proof of guilt.[13/]

Second, the Seventh Circuit noted that "there could well be underlying differences between the situation of a corporation officer whose performance must depend upon bookkeepers, auditors, and accountants for the preparation of books relating to financial matters not under his personal dominion and the situation of a person dealing with his own individual income all of which was derived from personal services rendered by him." 476 F.2d at 321. Although Mr. Nathan's corporation was a family business, it was a substantial operation with a considerable number of employees and with complicated financial records. It was much closer to the business in Pechenik than to that in Scher.

Third, the Court of Appeals in Scher relied on at least two strands of evidence that affirmatively demonstrated concealment by the defendant. There was testimony that the accountant had discussed with the taxpayer the total figures that appeared on the return--as well as some other details--when tax time was at hand. The discrepancy in gross income

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13/ We note, in this regard, that Mr. Nathan asked to appear before the grand jury that indicted him and did, in fact, testify. No part of his grand jury testimony was offered in evidence against him. The defense decision to put on no evidence whatever was obviously dictated, in large part, by trial counsel's view as to the weakness of the prosecution case when it rested. Consequently, the defendant's failure to take the stand--besides being constitutionally protected--cannot be read as any indicator of weakness or uncertainty on his part.

between what had been reported on the return and what was actually received was very substantial, but the defendant failed to comment on it or to answer the accountant's question, "if he knew of 'any other items which would probably be recorded in the income tax return.'" 476 F.2d at 323. A second, and even more damaging, piece of evidence was the defendant's false or evasive answer given to an IRS Special Agent who asked the defendant whether he had cashed patients' checks rather than depositing them in his bank account. The court said (476 F.2d at 323):

> It is to be noted that this damaging testimony as to Scher's proclivity for "covering-up" was not put in for impeachment purposes. Scher had not yet testified, and the misstatements had their own independent probative value.

No evidence was introduced here that Mr. Nathan had ever made any false statements to IRS agents. If, in an interview with an agent, he had denied cashing checks at the client hotels or been evasive as to this practice, that proof would have been comparable to the "damaging testimony" in Scher. In fact, the contrary was true. Mr. Nathan stated openly that he had engaged in this practice, and it was his accountant's responsibility to work out the consequences for purposes of the corporate records and tax returns.[14/]

In Fahey, there was ample evidence that the taxpayer had, in various forms, personally completed by him, characterized

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14/ When asked about this practice during his grand jury testimony, Mr. Nathan freely admitted it (A. 48):

> Q: It is a fact, is it not, that you frequently cashed checks at the various clients of yours, for whatever purpose, isn't that right?

footnote continued

as "salary" amounts that he had deliberately excluded from the income shown on his tax return. In fact, he had signed a partnership return that listed his own receipts as salary. This record, by contrast, reveals no affirmative evidence of willfulness. It discloses, at most, an impatient businessman who handled some of his corporation's financial affairs in a hasty manner, with insufficient contemporaneous documentation.[15] At most, the culpability shown here is comparable to that which, under reported cases, has resulted in the imposition of civil negligence penalties. In Leonhart v. Commissioner, 414 F.2d 749 (4th Cir. 1969), for example, the sole stockholder of a family Subchapter S corporation claimed that no 5 percent negligence penalty should be imposed upon him because he had "relied in good faith on the erroneous advice of a certified public accountant." The Fourth Circuit rejected that argument on the ground that the accountant had not been "fully apprised of the circumstances of the transactions." The Court observed

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14/ continued

> A. Yes, sir. I never cashed it at my own bank. I never--I can't-- I'm sort of a nervous individual. I don't like to sort of buck lines, so to speak, and this is--so that's the way it's handled.

15/ This case differs, toto caelo, from a case such as United States v. Lisowski, 504 F.2d 1268 (7th Cir. 1974), where the taxpayer gave specific instructions to a purchaser from his family business to make partial payments in cash (while part of the purchase price was being paid, sometimes simultaneously, by check). Such a "clandestine manner" of doing business, which could not be explained in any reasonable manner, was, of course, sufficient to distinguish Pechenik.

that the accountant had "made his determinations from check stubs and schedules prepared by Mr. Leonhart." The nature of the deductions claimed in Leonhart were particularly egregious and the inference that the nondisclosure to the accountant was done in bad faith was far stronger than here. In Leonhart, as the Court noted, the erroneous deductions included "payments for music lessons for taxpayers' children, full depreciation on vehicles used substantially for personal purposes, restaurant and bar expenses of taxpayers' son who was not at the time employed by the company." 414 F.2d at 750. Analogous circumstances--giving rise only to civil negligence penalties--were shown by the records in Berkley Machine Works & Foundry Co. v. Commissioner, 422 F.2d 362 (4th Cir. 1970), and in Cataldo v. Commissioner, 476 F.2d 628 (2d Cir. 1973). Indeed, in several reported cases, reliance by a busy taxpayer on the work of an accountant who bases his computations on checkbook stubs and bank records--or, indeed, computations by a taxpayer himself based on these records -- have been held sufficient to overcome the IRS' claim even for civil penalties. E.g., Wiseley v. Commissioner, 185 F.2d 263 (6th Cir. 1950); Melinder v. United States, 281 F.Supp. 451 (W.D. Okla. 1968). In our research, we have not found a single civil penalty action--much less any criminal prosecution--in which the evidence of intent was as weak as it was here, and we challenge the government to cite to this Court a case in which even a civil penalty was imposed on such flimsy proof.

B. The allegedly "irregular and deceptive" practices were entirely lawful and open.

The prosecution responded to the defendant's post-trial motion for a judgment of acquittal by describing Mr. Nathan's conduct in conclusory and inflammatory terms--asserting, without support in a single specific item of evidence--that the practices previously described were "schemes" that constituted "a highly irregular or deceptive course of business," and that they were conducted in a "clandestine" manner. If the practices are examined objectively, however, it is clear that they were in no way deceptive, did not remotely constitute a "scheme," and were not "clandestine."

(1) The unnegotiated checks--There is no evidence whatever that the issuance of the checks was in any way "irregular." The check stubs (e.g., A. 660-673) show persuasively that checks were issued and mailed in due course.[16/] Mr. Nathan considered those checks to be "live" obligations, and he

16/ On one occasion, the prosecutor tried to convey to the jury the inference that the checks were never mailed out--a suggestion totally unsupported by the record and vigourously contested by the defendant (A. 502). In fact, the stub-book shows that other checks--those which were not sent out--were voided (e.g., A. 661-662). And the prosecution, which pursued Mr. Nathan's 1966 accountant to California (where he now lives), was surely able to verify with the payees of these checks whether the amounts shown were due. There was not the slightest suggestion in any of the evidence that the checks were based on nonexistent obligations or were otherwise different from ordinary and customary payments.

and he instructed the banks to pay them whenever they were deposited. This treatment of the checks apparently satisfied Mr. Katz that they should be retained on the books, particularly when he observed that a number of "stale" checks were negotiated long after they were written. Katz's view had been shared by the previous accountant, Mr. Dunst. Mr. Edwards disagreed with it only to the extent that the outstanding checks would give the firm a negative bank balance--that much emerges both from his letter (Government Exhibit 3, A. 652) and his testimony (A. 112).

At all times, the outstanding checks were kept prominently on the books and records of the firm. See Government Exhibit 6. No effort was made to conceal them or to describe them as anything other than what they were. Finally, when the IRS indicated in the course of its audit that it believed that the unnegotiated checks should be written off, two CPAs whom Mr. Nathan had in his employ decided that the way to do this was to absorb into income checks that were five years old or more. This was mentioned to the IRS agent, and he in no way suggested that such a course would lead to a criminal indictment for any checks not immediately absorbed as income. Yet while the government apparently has accepted the "five year" treatment given in the 1969, 1970, and 1971 returns to the checks written in 1963, 1964, 1965 and 1966, it has taken the inconsistent position that the unnegotiated checks written in 1967 and 1968 should have been returned to income immediately. What, one wonders, should Mr. Nathan have done in light of his accountant's advice in 1971 and 1972?

The prosecution presented its case to the jury on the premise that the outstanding checks were equivalent to specific intent to evade taxes. But the equation will not stand. Even assuming that Mr. Nathan had determined not to write off the unnegotiated checks--an assumption that we do not believe to be supported by the evidence--that determination is not equivalent to tax evasion.

(2) The cashed checks--The prosecution introduced no evidence whatever that the cash received by Mr. Nathan was used for any purpose other than business expenses (which he had asserted under oath before the grand jury). Nor did it introduce a scintilla of proof to show that he knew how his accountant was treating these checks.

The only evidence relating to use by Mr. Nathan of the funds obtained from these checks indicates that they were spent as gratuities for credit managers or other representatives of the Nathan firm's clients. Mazzurco admitted that on every occasion when Mr. Nathan presented a statement, along with a refund check for the hotel he added a cash gift for the credit manager. This, he said, was customary in the business. Groppe would, we believe, have had to admit receiving such gifts on a regular basis if his cross-examination had not been aborted by the trial judge's improper ruling (pp. 51-56, infra).

The inference that the money was used primarily for this purpose is strengthened by an examination of the government's own exhibits. Time and again, a cashed check appears in immediate conjunction with a refund check to the same hotel. Our

Appendix contains several illustrations (A. 667, 669, 670, 671), and we reproduce two more on the following pages to demonstrate our point. On May 31, 1968, a refund check was made out to the New York Hilton in the amount of $1,700.57. Immediately below appears a check stub indicating a cashed check to the New York Hilton in the amount of $175. On June 4, 1968, a check to the Waldorf-Astoria for $1,579.29 was followed by a "cashed" check in the amount of $215. The inference is obvious--when Mr. Nathan presented these refund checks to the credit managers, he needed cash for the contemporaneous gratuity, and possibly for others he might be visiting that day.

Had the prosecution introduced any evidence whatever that the currency obtained by cashing these checks had been put to personal use--that it had paid for music lessons as in Leonhart, supra or for other personal purchases--there would be at least some factual basis for charging tax evasion. But there was no such evidence, and Mr. Nathan--under oath before the grand jury--flatly denied it.

On the question of whether Mr. Nathan knew how the accountant was treating these checks, the prosecution's case is even weaker. Here there is totally uncontradicted evidence in the trial record squarely conflicting with the government's naked assertion of "guilty knowledge". Katz' testimony is unequivocal on this point: he made the entries entirely on his own, and he simply neglected to look at the backs of the checks or to consider other indicia that they were cashed rather than being refunds.

No. 103829

6/4 19 68

Waldorf Astoria

6

1579 29

No. 103830

6/5 19 68

Waldorf Astoria

215

No. 103831

6/5 19 68

Rain Fire

20

FIRST NATIONAL CITY BANK

GOVERNMENT'S EXHIBIT
U. S. Dist. Court
S. D. of N. Y.
53A

No.103727

1/28 1968

Nat'l City Bank 20,000.00

(Offset with Credit same account 5/29/68)

No.103728

5/31 1968

Y. Helton 1,700.57

No.103729

5/31 1968

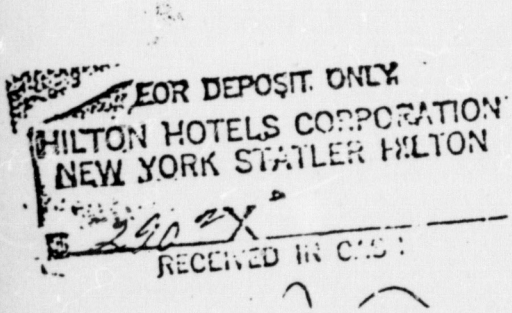
Y. Helton 175

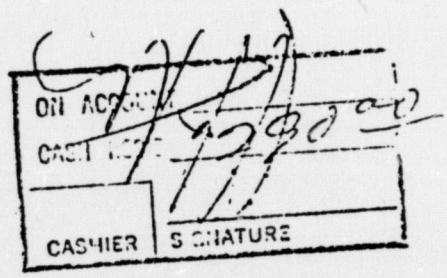
IATIONAL CITY BANK

GOVERNMENT'S EXHIBIT
U. S. Dist. Court
S. D. of N. Y.

105A

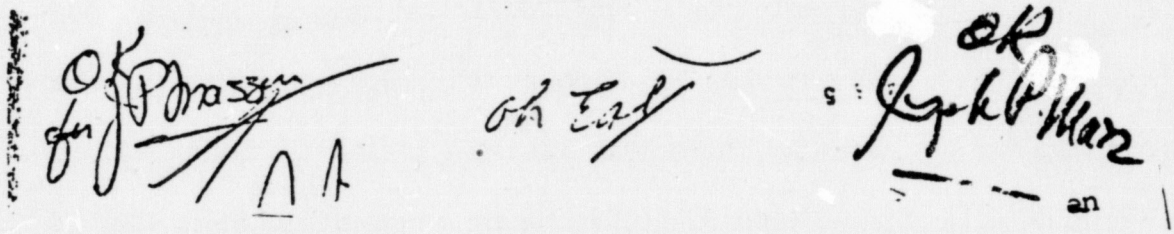
The prosecution asserts that it was Mr. Nathan's obligation to tell his accountant how the money was spent. But an occupied businessman may reasonably expect his accountant to ask the relevant questions; it is not his job to anticipate what the accountant's problems will be. Should Mr. Nathan have assumed that his accountant would not know that the checks to the hotels were not "refunds"? A quick look at the exhibits we have previously reproduced shows that there were often two consecutive checks to the same hotel--a substantial indication that they were being used for different purposes. The cashed checks were also written out in round dollar amounts, whereas the refunds were in precise figures usually set out to the penny. Both of these belie the assertion repeatedly made by the prosecution below that the cashed checks "looked just like refund checks." But most telling of all was the accountant's own admission that if he had done his job and turned the cancelled checks over he would have seen either a stamp indicating that the checks had been negotiated





for cash or the signatures or initials of the credit manager that would similarly have shown that these were not deposited directly

to the hotel's accounts.[17] On this record, there is simply



no proof of deliberate withholding of information or other action that could have misled the accountant.

17/ The samples that appear here in our brief are taken from the Government Exhibits 398, 133, 85, 405, 71 and 72.

II

NUMEROUS TRIAL ERRORS REQUIRE, AT THE LEAST, REVERSAL AND REMAND FOR A NEW TRIAL

We have emphasized, in this brief, the question of the sufficiency of the evidence to sustain the criminal charges because we believe that a judgment of acquittal should have been entered and Mr. Nathan should not be required to undergo the strain and expense of a second trial. But if this Court disagrees with our contention that the proof of guilt was insufficient, we submit that a new trial is plainly required. In this very brief proceeding, there were a variety of trial errors that rendered the proceedings most unfair. Because of the space limitations imposed by Rule 28(g) of the Federal Rules of Appellate Procedure, we are constrained to cover these summarily.

A. A critical theory of defense was curtailed by erroneous exclusion of the Groppe tape recording and improper instructions to the jury.

Before the grand jury Mr. Nathan had asserted that the funds received from the cashed checks had been used for business purposes. As our previous discussion indicates, this fact was an important element in defending against the tax evasion claim. The prosecutor stated in his summation that the money from the cashed checks went "right into [Mr. Nathan's] pockets," asserting that there was no proof that it

"was used for any other purpose" (Tr. 686[18]). In fact, Mazzurco had testified that he had received cash payments from Mr. Nathan and another credit manager, Carey, admitted being "entertained." The third credit manager -- Lawrence J. Groppe -- said he had received checks at Christmastime, but otherwise denied having been paid. This testimony amply raised the issue whether the proceeds of the cashed checks had been used to promote business by paying client representatives.

(1) The tape -- Apparently the IRS agents had confronted Groppe with two checks (presumably not written during the holiday season) given him by Mr. Nathan in 1968 and 1969, and Groppe had told the IRS agents that these were payments for collection work he had done for Mr. Nathan (A. 200). He not only gave this account to the IRS in an interview, but also signed a sworn affidavit to that effect.[19]

The affidavit was false, as was the sworn testimony at trial. In fact, Groppe had received gratuities from Mr. Nathan and was attempting, for reasons of his own, to deny receipt of such payments. Obviously, the fact that cash

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18/ It was, of course, not the defendant's burden to introduce evidence that it was used "for any other purpose."

19/ The affidavit was, by some oversight, not turned over to the defense under 18 U.S.C. §3500, but it had been made available to the defense by Mr. Groppe and was referred to during his testimony. It was the subject of colloquy in the absence of the jury (A. 197, 333-336). A copy of the affidavit appears as Appendix I to this brief.

gifts were made to Groppe bolstered Mr. Nathan's position that the cash obtained when checks were negotiated at the St. Moritz Hotel was used for business promotion purposes. It was essential, therefore to confront Groppe with incontrovertible evidence that he was lying under oath and to present that evidence to the jury.

Such evidence was available in the form of a tape recording of part of a telephone conversation of May 1974 between Groppe and Mr. Nathan. In the conversation Groppe had said, describing the story he had told the IRS about receiving accounts from Mr. Nathan, that "I made it up myself" because he "had to get out from under somewhere or other."[20/]

20/ A full transcript of the conversation appears in Appendix II to this brief. Although the tape was played three times for the trial judge, the court reported did not transcribe it.

Defense counsel properly laid the foundation for impeaching Groppe by asking him whether he had admitted to Mr. Nathan that the story he had told the IRS agents was untrue. Groppe denied making such an admission (A. 201). At this point, defense counsel advised the Court that he had a tape recording which he wished to play to impeach Groppe's testimony. The jury was dismissed, and the Court heard the recording. It was then discovered that the recording began in the middle of the conversation. Judge Bonsal thereupon refused to allow the recording to be played until defense counsel would "find out what conversations are what and who originated them," in which case, the recording could be presented "in the defense case" (A. 209). The following colloquy ensued (A. 210-211):

> MR. BENDER: I just want to say that I don't want my silence to acquiesce with your ruling. I think this man's impact is now.
>
> THE COURT: Nobody seems to know when this conversation started or when it ended. I will give you a chance to do that.
>
> MR. BENDER: He said it starts--

> THE COURT: We know when it ended, but I still don't know when the other one started. Let's take a few minutes' recess.
>
> (Recess.)[21/]

When the jury returned, the judge made the following explanation since the jury had seen the tape recording (A. 210-211):

> THE COURT: Ladies and gentlemen, the recess was caused because the defendant wanted to offer a tape of a conversation with the witness that the defendant had made. I was exploring that and I concluded that if we do receive this tape it would be more appropriate if we receive or [sic] later in the trial in the defendant's case and not now, but I had to hear the thing to make that ruling. That's why you were delayed.

There was additional discussion about the tape on succeeding days (A. 335):

> THE COURT: . . . I would like to say this, on that tape, and that was one of the things that motivated me, there was really no foundation on the tape. On the cross-examination I realized what your position and what you were

---

21/ Since the judge interrupted defense counsel's explanation of why the recording started in the middle of the conversation, we believe it appropriate to advise this Court that Mr. Nathan has indicated that after Groppe--who had called--told Mr. Nathan that he had given a false statement to the FBI, Mr. Nathan interrupted the conversation by advising Groppe that he had a call on another line. He then quickly sought advice on what to do and was told to record the remainder of the conversation .

> doing, but if you are going to bring that tape in in the defendant's case I want a proper foundation. I want the jury to know how it happened this was taped, I think they are entitled to know that, who did it and so forth. I think I would want that if it is going to come in.

Counsel explained at that time that the effect of the tape, at the time of Groppe's cross-examination, had been lost (A. 336):

> MR. BENDER: My intention is not to bring it in. I feel I have been precluded. I feel I lost the effect of it by not bringing it out and to bring it in on my case doesn't help, so my intention at the moment is not to bring it in.

On the following day, when the matter of the tape was again raised -- this time by the prosecution -- the judge commented that he didn't "quite see what relevance" the tape had (A. 563). Yet the jury evidently recognized its relevance: less than three hours after its deliberations began, the jury sent a note to the judge requesting that it be allowed to hear the tape (A. 623). Since the tape was not admitted in evidence, the jury's request was not granted.

The exclusion of the tape was clear error under binding decisions of this Court. In United States v. Barash, 365 F.2d 395, 400-401 (2d Cir. 1966), a prosecution witness was asked, on cross-examination, whether he had ever threatened the defendant. When he denied having made threats, the

defense confronted him with contradictory tape recordings, in which he recited his threats to another government witness. Judge Friendly, for a unanimous court, reversed the conviction because the trial judge had cut off some of the cross-examination relating to the tape recordings. He commented, in so doing, that "[i]f the judge had followed his own bent and prevented any cross-examination as to the tapes, the convictions on the twenty counts relating to Clyne would surely have to be reversed." 365 F.2d at 401. In this case, because of the Court's ruling, there was no cross-examination whatever with respect to the contents of the tape.

The ruling also conflicted with the premises underlying this Court's decision in United States v. McKeever, 271 F.2d 669, 675-676 (2d Cir. 1959), where this Court sustained the exclusion of a tape recording used for impeachment of a prosecution witness. Since a stenographic transcript of the tape was read to the jury, the Court agreed that it was not reversible error to exclude the recording itself. The Court noted

that the recording "contained so many self-serving statements by the defendant McKeever that it is doubtful whether any instruction by the trial judge that the jury should not consider McKeever's taped statements as bearing on the truth or falsity of his defense would have been adequate to prevent such consideration." 271 F.2d at 676. The tape recording involved here did not contain any statements of this kind by Mr. Nathan. No instruction would have been necessary, and it was error to preclude the cross-examination and exclude the tape.

Judge Bonsal's stated reasons for barring the tape were plainly erroneous. The contents of the tape were extremely relevant to the question whether Groppe had been receiving cash payments from Mr. Nathan. The fact that only a portion of the conversation was recorded did not make it unusable as impeachment material. It is well-settled that "any writing or thing may be used to stimulate and revive a recollection" (3 Wigmore, Evidence §758 (1970)), and this rule includes a cross-examiner's use of a prior inconsistent statement to impeach a hostile witness (id. at §764). Just as copies or fragments of a document are admissible for this purpose, tape recordings--even if portions of a conversation are inaudible or not recorded--are equally so. See, e.g., United States v. Schanerman, 150 F.2d 941, 944 (3d Cir. 1945).

If, for example, the defense had only the second page of a two-page handwritten letter by Groppe and that letter had contained a statement contradicting his testimony under oath, it would suerly have been proper to show him that page, ask him whether it was in his handwriting, and impeach his testimony with the prior inconsistent statement. (See, e.g., 4 Wigmore, Evidence §§1258-1260 (1972)). If he had any explanation for that statement based on the missing first page, he could offer it during his testimony. The same procedure should have been followed with regard to the tape recording. Groppe could have been asked whether it was his voice on the tape and whether he made the statements admitting that his sworn account to the IRS was false. By precluding that line of examination, Judge Bonsal closed off critical inquiry on a central issue.

(2) The original jury instructions-- This error was compounded by the trial judge's refusal to present to the jury, in his final charge on the law, the theory of defense based on the payments to credit managers. There can no longer be any doubt that a criminal defendant has the right to have a jury instruction that sets out a theory of defense supported by evidence introduced at trial. E.g., United States v. Platt, 435 F.2d 789 (2d Cir. 1970); United States v.

O'Connor, 237 F.2d 466, 474 n.8 (2d Cir. 1956). The testimony of all the credit managers--and particularly that of Mazzurco--laid a factual basis for this defense. Two separate instructions were requested in this regard--Defendant's Requested Charges 10 and 11 (A. 690-692). Request No. 10 stated:

> In order for you to find that Nathan, Nathan & Nathan, Ltd. improperly deducted as expenses on its tax returns for 1967-1970 the corporate checks the defendant cashed at the Waldorf Astoria, New York Hilton, Statler-Hilton and the St. Mortiz, and that the defendant should have reported on his individual income tax returns for 1967-1970 the total amount of those checks cashed in those years, as claimed by the Government in Counts 1, 2, 3, and 4 of the indictment, the Government must prove beyond a reasonable doubt that the defendant did in fact receive the cash from those checks, that the defendant did not in fact spend or use said sums of money for the benefit of the corporation, that the defendant derived some individual economic benefit from the cash received, and that the defendant's conduct in this regard was motivated by a specific intent to cheat the Government of taxes.

Request No. 11, in relevant part, stated:

> There has been evidence that the defendant paid Mr. Mazzucco, the credit manager at the Waldorf Astoria Hotel, which was a client of Nathan, Nathan & Nathan, Ltd. for said client, and that such payments were a common practice by companies engaged in collecting delinquent accounts for the Waldorf Astoria.
>
> Consequently, if you should find that the checks which the defendant cashed at the Waldorf Astoria, New York Hilton, St. Moritz, and Statler-Hilton, were paid out for the purpose of assuring a continued flow of business from his clients,

> whether in the form of pay-offs, gratuities, or kickbacks, then such payments cannot be considered as additional income to the defendant as charged in Counts 1-4, inclusive, of the indictment because theyare deductible as ordinary and necessary expenses notwithstanding their misclassification in the books and records of the corporation as refunds.

Both were denied on the cryptic ground that they related to "a question of circumstantial evidence" (Tr. 603-4). After the charge defense counsel again objected to the omission of this theory (Tr. 727-8).[22/] The omission of the instruction was patently erroneous, and the error was preserved by counsel at every point.

(3) The answer to the jury's question -- The error was compounded even further when, in answer to a question from the jury regarding the cashed checks, the trial judge stated that the government's theory was that the funds received from these checks had been used by Mr. Nathan "for his own purposes." Defense counsel requested that the judge add that the jury should acquit the defendant if the funds were used for corporate purposes, and the following colloquy ensued (A. 626):

> THE COURT: There is no evidence on which they can so find, is there?
>
> MR. BENDER: Yes, there was.

22/ These relevant portions of the Transcript were inadvertently omitted from the Appendix. They appear as Appendix V to this brief.

THE COURT: What?

MR. BENDER: The evidence of Mazzurco.

THE COURT: Oh, no, I don't think so. You have an exception on that. You have an exception on that.

Judge Bonsal was wrong. The evidence of Mazzurco did show that the money was being used for corporate purposes, and the evidence that could have been secured from Groppe if proper cross-examination had been allowed would have supported that contention.

B. The jury's attention was diverted from the central issue in the case by the unjustified admission of outsized charts whose use was not circumscribed by cautionary instructions.

The factual issues in the trial pertained to Mr. Nathan's knowledge or intent and to the use made of the funds received when the cashed checks were negotiated. The number and amounts of both the cashed and unnegotiated checks were undisputed, and in fact, largely stipulated (A. 501). Without showing the exhibits to defense counsel in advance, the prosecution offered in evidence, toward the conclusion of its case, two charts that measured seven-and-a-half feet by three feet which purported to list all the

unnegotiated checks for 1967 and 1968 and the cashed checks.[23] They were received over defense objection that they were designed "to overwhelm the jury" and that they did not help in an understanding of the case.

When the first of the charts was introduced into evidence, Judge Bonsal made the following statement to the jury (A. 501):

> THE COURT: 336 will be received and this is merely a chart, ladies and gentlemen, which contains the information as to those various checks, exhibits 31 to 145. The checks themselves are the evidence, the chart is merely to help you as a pictorial representation.

No similar admonition was given when the second of the charts was admitted (A. 508):

> THE COURT: I am receiving Exhibit 338, but I have asked the government to make a couple of additions to it which I think will make it more meaningful to you, which will indicate where they got the form which comes from the checkbooks. These are checks which the government [con]tends were issued by Nathan, Nathan & Nathan and are still outstanding and I am going to ask you to

---

23/ In our Appendix, at pp. 674-683, we have reproduced the mammoth charts, as well as sections of them. The short bar that appears under the second column on page 674 and under the third column on page 679 is a one-foot ruler, which gives the Court a sense of the huge size of the full exhibit.

> give a date as to when they were out-standing and to also indicate the exhibit numbers.

(1) The charts themselves--More careful scrutiny of the charts than was possible in the heat of trial has turned up a number of inaccuracies--some of which may have unjustifiably led the jury to question the bona fides of Mr. Nathan.[24] We do not, however, challenge the charts here on grounds of accuracy, since no such objection was asserted below. We do, however, maintain that given the factual issues presented in this proceeding, it unfairly diverted the jury's attention from the real questions before it to allow the prosecution to present charts that were more than seven feet long to summarize undisputed statistics.

The Supreme Court warned against the prejudicial effects of such charts in Holland v. United States, 348 U.S. 121, 128 (1954):

24/ Compare, for example, the payees of the unnegotiated checks issued on March 31, 1967, as shown on the chart (A. 680) with the names in the check-stub book (A. 660-665). A jury-member who would look only at the chart might wonder whether checks made out to "Nazer," "Johnson," "Logo" and "Johnson" were legitimate, but that suspicion would evaporate if he or she knew that "Nazer" was "Manger Annapolis," "Johnson" was "Howard Johnson Motor Lodge," "Logo" was "Logo Mar Hotel" and the second "Johnson" was "Johnstown Motor Inn" (A. 664-665).

> The possibility of [improper jury inference of guilt] increases where the jury, without guarding instructions, is allowed to take into the jury room the various charts summarizing the computations; bare figures have a way of acquiring an existence of their own, independent of the evidence which gave rise to them.

This jury asked for the charts and apparently gave them substantial weight (A. 621). The existence of the charts may well have obviated any need on the jury's part to see the original documents. Consequently, autoptic proof relating to contested issues--such as the stamps on the checks and the sequence of check-stubs--may have been ignored.

Although charts are useful and appropriate in certain situations, courts have generally spoken of them as admissible where there are "voluminous records and complex figures" at issue in the case. E.g., United States v. Schenck, 126 F.2d 702, 709 (2d Cir.), cert. denied, 316 U.S. 705 (1942); United States v. Kelley, 105 F.2d 912 (2d Cir. 1939). Compare Costello v. United States, 350 U.S. 359, 360 (1956) (144 witnesses and 368 exhibits in a net worth case); Hoyer v. United States, 223 F.2d 134, 138 (8th Cir. 1935) ("[t]he documentary evidence presented a complicated situation and required elaborate compilations which could not have been made by the jury"). The prosecution's full case here--apart

from the testimony of the "summarizing agent" -- took only 2 1/2 trial days, and no complicated facts or computations were involved.

In this case, as in Elder v. United States, 213 F.2d 876 (5th Cir.), cert. denied, 348 U.S. 901 (1954), the charts focused the jury's attention on matters which did not bear upon the issues in the case. Compare United States v. Altruda, 224 F.2d 935 (2d Cir. 1955); United States v. Vardine, 305 F.2d 60 (2d Cir. 1962).

(2) The absence of cautionary instructions--If the only error in this regard had been the admission of the charts and their use had been carefully circumscribed by cautionary instructions to the jury, reversal might not be warranted. But the imbalance created by admitting the charts was aggravated when the trial judge did nothing more than tell the jury--only when the first chart was presented--that "the chart is merely to help you as a pictorial representation." The same admonition was not given when the second chart was presented to the jury, and absolutely no cautionary instruction was given to the jury on this subject at the end of the case.

The absence of a concluding instruction was particularly unjustified in view of the fact that both the prosecution and the defense requested such a charge (A. 695, 700).

Judge Bonsal indicated that he would give some form of caution and ruled that both requests were denied except as incorporated in his charge. We cannot find where such incorporation occurred.

The law on the subject is clear. Not only did the Supreme Court say in Holland that "guarding instructions" were necessary, 348 U.S. at 128, but this has been the consistent admonition of Courts of Appeals See, e.g., United States v. Silverman, 449 F.2d 1341, 1346 (2d Cir. 1971), cert. denied, 405 U.S. 918 (1972) ("the trial judge twice gave clear instructions to this effect when the summaries were offered, and again when the jury asked for them during its deliberations"); United States v. Goldberg, 401 F.2d 644, 648 (2d Cir. 1968), cert. denied, 393 U.S. 1099 (1969); United States v. Bartone, 400 F.2d 459 (6th Cir. 1968), cert. denied, 393 U.S. 1027 (1969).

C. The trial judge's many interruptions on the prosecution's side conveyed to the jury the impression that the judge believed the defendant guilty.

The very severe sentence given by the trial judge to a defendant who had received an excellent probation report, who had no prior involvement with the law and who was being sentenced,

in the judge's view, only "to see that this kind of thing does not occur" (Transcript of December 8, 1975, p. 29), indicates that, for some unexplained reason, the judge was sharply antagonistic to Mr. Nathan. The same underlying feelings emerged, we believe, during the presentation of the evidence, and the jury must have inferred from the judge's interruptions and remarks favorable to the prosecution, that he believed the defendant to be guilty. Under a line of decisions by the Court which include United States v. Fernandez, 480 F.2d 726 (2d Cir. 1973); United States v. Nazzaro, 472 F.2d 302 (2d Cir. 1973); United States v. Grunberger, 431 F.2d 1062 (2d Cir. 1970); United States v. Guglielmoni, 384 F.2d 602 (2d Cir. 1967), reversal of the judgment is required on this ground alone.

There is, of course, no totally objective yardstick by which to measure when a trial judge goes beyond assisting the jury to understand the evidence (United States v. DeSisto, 289 F.2d 833, 834 (2d Cir. 1961)), and gives the appearance of partisanship condemned by the cases cited above and by Judge Clark's opinion in United States v. Curcio, 279 F.2d 681, 682 (2d Cir.), cert. denied, 364 U.S. 824 (1960). At times, the mere number of questions asked by the court may have this effect. In this case, it was not simply the number of

interruptions or questions, but the nature of these interpositions that turned the judge into an obvious partisan.

Space does not permit an elaboration of all the instances, but the most dramatic was the trial judge's remark during the testimony of the only witness who said anything of substance to implicate the defendant--the interim accountant Allan Edwards:

Edwards' direct examination concluded with no explicit reference as to why he was discharged, but with the jury being left to infer that his advice regarding the unnegotiated checks had caused Mr. Nathan to fire him. On cross-examination, however, Edwards was forced to admit that the reasons given by Mr. Nathan for firing him were that he had used "juniors" on the job and had sought unauthorized extensions (A. 155). In an effort to rehabilitate the witness, the prosecutor asked on redirect whether Edwards' discussions with Mr. Nathan were "usual" (A. 166). Defense counsel properly objected, so the judge took over the questioning and asked whether Edwards "had any other occasion with a client when they got into the same kind of situation" (A. 167). This question--hardly less objectionable that the prosecutor's--was followed with the following inquiry by the Court that plainly assumed the very vigorously disputed fact (A. 167):

> THE COURT: Why don't you come right down to the nitty gritty. Has anybody else discharged you because they didn't want to go along with your accounting ideas?

In fact, Edwards had not testified that this was the reason he was discharged. He admitted that Mr. Nathan had "hit the ceiling" over the extension of time and had been angered by the use of junior employees. His own memorandum demonstated that there were serious differences over the size of his fee. Later, Katz' testimony corroborated the existance of harsh feelings between Messrs. Nathan and Edwards. The Court's question was a clear indication to the jury, however, that the judge believed that Edwards had been discharged because Mr. Nathan "didn't want to go along with [his] accounting ideas"--thereby deciding the central issue in the case, willfulness, against the defendant.

Two other instances of the Court's protective attitude toward Edwards appear in Appendix III to this brief. There were, in addition, other situations when the Court took over the prosecutor's job by interrupting defense lines of cross-examination <u>that were not objected to by the prosecutor</u>. In Appendix IV to this brief, we reproduce 17 of the more prejudicial instances when the trial judge took over the prosecutor's role and either foreclosed a question which defense counsel had asked and to which there had been no objection or restructured the witness' response so that it was more harmful to the defendant than it had originally been. When the prosecution was questioning its witnesses--particularly when Edwards was on the stand for direct examination--there

were no such interruptions. But defense counsel was prevented time and again from pressing the witnesses to secure statements favorable to the defendant.[25/]

CONCLUSION

For the foregoing reasons, the judgment should be reversed.

Respectfully submitted,

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Dated: February 13, 1976

Attorneys for Appellant

25/ The errors that affected this trial continued through the jury's deliberations. First, they were interrupted by the frantic pleading of the husband of one of the jurors that his wife's presence on the jury "was causing great trouble in the family." (A. 628). Second, after the jury stated that it was unable to reach a decision (A. 631), the judge asked the jury if it had reached a partial verdict (A. 633). The jury responded that it had reached a verdict of guilty on the first four counts. The taking of this partial verdict was erroneous, as Rule 31(b) of the Federal Rules of Criminal Procedure explicitly permits a partial verdict to be taken only "if there are two or more defendants." Where the charges are against one defendant, where those charges are inextricably tied together, and where every indication is that the jury's decision is tentative and the result of confusion, it is clear error to ask for or accept a partial verdict. Third, the trial court erroneously refused to poll the jury at the conclusion of the full proceeding. Although the jury was polled at the time of the partial verdict, the logical inconsistency of a guilty verdict on the first four counts and any other verdict on the last four made it vital for the Court and the parties to know whether, in light of the final disposition, the jury understood that its partial verdict still stood. Defense counsel objected to the taking of the partial verdict (A. 632) and to the refusal to poll (A.648-649).

A-1 . **AFFIDAVIT** APPENDIX I

United States of America _____)
_____ District of _____) ss

I, LEONARD J. GROPPE CREDIT MANAGER ST. MTZ, state that:

I reside at 59 PHIPPS LANE PLAINVIEW, L.I. N.Y.

During the period May 1964 through 1972 I collected delinquent account for Jack Nathan. Jack Nathan would deliver to me, as outstanding bill of a particular individual who owed money to a hotel. I would then take this bill and try to effect collection. My fee for this service was as follows: For collections over $200 I would receive $50, for collections over $500 I would receive $100, I did not do many collections for Jack Nathan. My yearly receipts from Jack Nathan were in the area of $200-$300 per year. I no longer do collection for Jack Nathan.

Jack Nathan has been collecting delinquents for the ST. Moritz for approximately 24 years. Jack Nathan and his wife Evelyn dine frequently at the ST. Moritz Hotel where he does maintain a credit account.

I have read the foregoing statement consisting of this page only. I fully understand this statement and it is true, accurate and complete to the best of my knowledge and belief. I made the corrections shown and placed my initials opposite each.

I made this statement freely and voluntarily, without any threats of rewards, or promises of reward having been made to me in return for it.

Leonard J. Groppe
(Signature of affiant)

Subscribed and sworn to before me this 10
day of MAY, 19 74,
at ST MORITZ HOTEL
NEW YORK, NEW YORK

Edward Mulcahy
(Signature)

Special Agent
(Title)
Internal Revenue Service

T. Schneider
(Signature of witness, if any)

U. S. TREASURY DEPARTMENT - INTERNAL REVENUE SERVICE GPO 664-586 FORM 2311 (7-56)

APPENDIX II

JN My attorney about that and he said who was the guy that seemed to put the pressure. Was it Howard Schneider? Was that the guy?

LG No. A guy named Melendez.

JN Well, what, did they tell you to sign this thing without knowing what you signed?

LG No, he just asked me about this, you know. I said I told him. All he said to me was, did Mr. Nathan eat here? Yes, I guess he ate here once in a while. I don't recall frankly. I think he came here and had lunch once in a while.

JN But about that other thing that you made up about whatever you arrive at, that I gave you accounts. Whose idea was that?

LG That was my idea not his.

JN You made it up yourself?

LG I made it up myself.

JN Well, why did you make it?

LG I did it. I don't know why I did it. He hit me all of a sudden and I figured I had to get out from under somewhere or other. That's why I did it.

JM So you just made up that I gave you accounts and that

LG I only had a couple of ones. It didn't really work out too well because we did not have enough business out there.

JN So what did you do? You made it up yourself.

LG Yeah

JN Did he say anything when you-You didn't tell him you made it up or anything?

LG Oh no o o o

JN I see. Okay, All right, thanks a lot.

LG He says to me, don't you have a record of them. Certainly not but I don't keep those things. I got them four years ago, but when the things are collected I throw them away.

JN The thing is you told them that I brought you - I never brought you any accounts.

LG I know that. I realize that.

JN Okay. Take it easy. Thanks a lot. Bye.

APPENDIX III

(1) - Immediately after Edwards was forced to disclose on cross-examination the embarrassing information that Mr. Nathan had fired him for good reason, he attempted to convey to the jury the impression that Mr. Nathan had specifically told him to ignore the matter of the unnegotiated checks (A. 155-156 emphasis added):

> Q: [By Mr. Bender] Did Mr. Nathan at any time ever tell you with respect to what you say you called to his attention that there were some outstanding checks, from 1963, I think you said, and 1964, some $8,000 did he ever tell you not to void the checks or pick them up as income?
>
> A: Yes, sir.
>
> Q: He told you not to?
>
> A: Yes, sir.
>
> Q: When did he tell you that?
>
> A: At our meeting of March 11th.
>
> Q: You didn't tell us that on direct, did you?
>
> A: I told him that it--
>
> Q: Did you tell us on direct that?
>
> THE COURT: Do you recall that?
>
> A: It was about nine years ago, and I am trying to remember as best I could.

Q: You didn't tell us that on direct, did you?

THE COURT: It doesn't matter. He is telling us now.

MR. BENDER: Your Honor, it is cross-examination.

THE COURT: Go ahead, answer the question.

A: I think I answered the fact that Mr. Nathan refused to give me a definitive answer of what I should do.

At the two critical points of this cross-examination, the Court's comments (1) suggested to the witness that he might claim a faulty recollection and (2) suggested to the jury that the omission of a critical piece of evidence during the witness' direct testimony didn't "matter." Only because defense counsel persisted, notwithstanding the Court's assertion that the witness is "telling us now," was the witness forced to withdraw the overbroad generalization he had made with reference to Mr. Nathan. These comments followed a series of other interpositions by the Court during cross-examination which communicated the Court's protective attitude toward such of the witness' testimony as might be damaging to the Defendant. See A. 134, 136, 146, 147, 149, 151.

(2) Another time the Court provided Edwards with an answer he did not have to a damaging line of cross-examination. Edwards had insisted on direct examination that he refused to

prepare the returns unless the matter of the unnegotiated checks was cleared up. Yet his own memorandum (A. 652-653) indicated that the returns had been completed "and ready to be sent out" as early as February 4. He was asked the following pointed question (A. 143):

> Q: So then you had prepared it and you were not waiting for anything from Mr. Nathan to send it out?

The answer he began to give was totally unsatisfactory and unresponsive:

> A: I didn't send it out because I refused to send it out in the present form, the form that was there, unless and until--
>
> The Court then came to Edwards' rescue (A. 144):
>
> THE COURT: As I understand it, you needed documentation in support of the items and you didn't have that.

Edwards' gratitude at being saved but his continued inability to reconcile his testimony with his memorandum, emerge from his answer to the Court:

> THE WITNESS: Yes sir. I didn't prepare the return.
>
> THE COURT: That's what I understood.

Of course the memorandum stated that he did prepare the return, but the impact of the conflict between his oral testimony and the contemporaneous memorandum was blunted by the trial judge's timely intervention.

APPENDIX IV

(1) A. 191-192 (Groppe)

Q And Mr. Nathan was familiar with your preference that checks be made --

THE COURT: I don't know if he knows whether Mr. Nathan was familiar with it or not, but --

MR. BENDER: Can I ask him?

THE COURT: No. I think he indicated as far as Mr. Nathan's checks were concerned they were mostly made out to the hotel. Is that right?

THE WITNESS: That's right, sir.

THE COURT: All right.

Q Did Mr. Nathan know?

THE COURT: Did you tell Mr. Nathan.

Q Did you tell Mr. Nathan that this was the policy of the hotel?

A I don't think I ever told him directly, no.

(2) A. 219 (Carey)

Q And they put the stamp on the back indicating that cash was received?

A Right. Yes, sir.

Q Otherwise someone might think it was income--

THE COURT: Never mind that.

MR BENDER: Your Honor doesn't want me to ask that question?

THE COURT: He stated the policy. That's all right. We have the policy. You don't have to put in otherwise. That's the policy.

(3) A. 235-236 (Mazzurco)

Q Was it a policy, if you know, in your business as the credit manager when you dealt with these people that they gave you gratuities from time to time?

A Could you repeat that, sir?

Q Yes, sure.

THE COURT: I think not policy, was it a practice?

Q I will accept your Honor's modification. Was it a practice or a custom?

A Yes.

(4) A. 224 (Katz)

Q Was this a very, very short of quiet meeting?

A Not with Mr. Edwards and Mr. Nathan.

THE COURT: I think I will sustain an objection to that.

(5) A. 329-330 (Katz)

Q Was there any further conversation with Mr. Nathan at that time wherein either you or Mr. Katzman specifically told Mr. Nathan what the amounts were and what the years were in which the checks were outstanding?

A You lost me.

THE COURT: He wants to know whether in these conversations either you or Mr. Katzman in your presence told Mr. Nathan the amount of these old checks in 1965 and so on.

Do you remember that?

THE WITNESS: Yes. In October Mr. Katzman definitely mentioned that to Mr. Nathan.

Q Mentioned what?

A The outstanding checks.

Q No, I know that.

A Specifically the years?

Q What did he say?

A I can't recall offhand.

Q Did he say --

THE COURT: He doesn't remember what he said But you brought it up?

THE WITNESS: Yes.

MR BENDER: May I probe this a little longer, your Honor? This is cross.

THE COURT: You can probe it, but not by putting words in somebody else's mouth.

MR BENDER: I certainly don't want to do that and I most respectfully except, your Honor.

THE COURT: All right.

Q You don't feel I am putting words in your mouth, do you?

A No. I am just confused with what you are asking me.

THE COURT: No, I think you are putting words in Mr. Katzman's mouth.

(6) A. 353 (Katz)

Q Had you looked at the back of those checks and seen that they were cashed at the hotel you would have treated them differently?

THE COURT: I gather that some of them would have been, not necessarily all as I recall the evidence. Some of them would have had a stamp and others not because I think the hotel people testified that sometimes they forgot to put the stamp on.

MR BENDER: I don't think I said stamped. I said cashed at the hotel.

THE COURT: I don't know how you can tell.

MR. BENDER: There was an okay with the credit manager's signature on these.

(7) A. 358 (Katz)

Q In doing your bank reconciliations about which you testified yesterday -- by that you explained checking the bank statements against the deposits and the cancelled checks in the check stub book and seeing that the balance comes out right. Wasn't it normal audit technique for a Certified Public Accountant --

THE COURT: I think you ought to confine that to his technique as a Certified Public Accountant.

MR. BENDER: I'm awfully sorry, I missed it.

THE COURT: Confine it to his experience and practice.

MR. BENDER: Excuse me.

(8) A. 360 (Katz)

Q Several.

You were thoroughly familiar with Mr. Nathan's business, were you not, while you were working there as an accountant?

THE COURT: I don't know what thoroughly means. While working there you had a familiar with it?

THE WITNESS: Yes, I was very familiar.

(9) A. 361 (Katz)

Q Did Mr. Nathan indicate the method by which he went and visited his clients and saw his clients and under what circumstances?

THE COURT: It would vary pretty much with client to client. Did he discuss with you how he would go about making collections?

THE WITNESS: You mean physically after the item came into his place or to get business to start with?

THE COURT: I guess it is both. Did he discuss with you how he would get business and did he discuss with you when he got the business?

THE WITNESS: No. These were things that I observed by being at the premises. These were things that in conjunction with my bookkeeping or accounting work, these are things that I gleaned from being there.

THE COURT: Observations?

THE WITNESS: Observations, yes.

(10) A. 364 (Katz)

Q In your audit work of the 1966 books, particular with the bank reconciliations, did you have occasion to see what length of time some of these outstanding checks --

THE COURT: How old they were?

MR. BENDER: How old they were. Thank you, your Honor.

THE COURT: Okay.

(11) A. 365-366 (Katz)

Q Your usual method in going up on your audit was to go up to the file which had been set aside where all material had been placed by the Nathan employees or Mr. Nathan for your consideration?

THE COURT: Wait a minute. He can go to the file all right and he can see what was in the file, but he can't testify that as a matter of knowledge that everything that should have been in that file was there. You can't say that, can you?

THE WITNESS: No.

(12) A. 375-376 (Katz)

Q Did you understand that to mean that he was saying --

THE COURT: What did you understand that to mean?

MR. BENDER: Did you ask it? I thought you didn't want me to ask that question.

THE COURT: I will let him answer when Mr. Nathan said that to you, what did you understand?

MR. BENDER: All right.

A I wasn't sure exactly what was meant by it. I really don't know.

(13) A. 378-379 (Katz)

Q You also indicated, did you not, that had you paid attention to the books and records you would have certainly brought the question up about writing off the outstanding checks, wouldn't you?

THE COURT: Did you say that?

THE WITNESS: I would like to say that, yes.

THE COURT: But did you say that at the time you had discussion with Mr. Nathan?

THE WITNESS: No. At that time I was just interested in the fact that the returns were not filed at all, which in itself was a horrendous problem. The outstanding checks at that point seemed to be minor compared to the non-filing of the tax return.

THE COURT: The point is you didn't bring up the question of the outstanding checks?

THE WITNESS: No, not at that point.

(14) A. 393-394 (Katz)

Q Why didn't they pay bank charges?

A I assumed that the --

THE COURT: Don't assume. Do you know?

Q Do you know?

A I don't know.

(15) A. 402-403 (Katz)

Q When they warned you of that what did you think they were trying to tell you?

THE COURT: I will sustain the objection to that.

(16) A. 406 (Katz)

Q Please do.

A The question that you directed to me was why did I place it into the refund column and I explained why. You didn't ask me if I misposted it, you asked me why I placed it into that column and I told you why, because I thought at the time that it was a refund. Now, had I had other knowledge--

THE COURT: Enough. You thought at the time it was a refund.

THE WITNESS: Right.

(17) A. 458-459 (Katz - redirect)

Q Did any of your other accounting clients maintain on their books outstanding checks that were three or four years old?

MR. BENDER: I will object to that, your Honor.

THE COURT: I will let him answer it if he knows.

MR. BENDER: You mean if it is a totally different business?

THE COURT: This is a question of his experience.

Did you have that experience with other clients, where there were a lot of outstanding checks?

THE WITNESS: No. This was the only collection client I had.

THE COURT: That wasn't the question. Whether the clients were in the collection business or otherwise, did any of them have a substantial amount of outstanding checks?

THE WITNESS: No.

THE COURT: The answer is no. O.K.

APPENDIX V

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is that by December of '71 the IRS was moving in so that it sought of balances out. I think I will leave that to your summation.

MR. BENDER: I only want to recall to your mind that juror number 9 gave you a question with respect to that and I wanted to make sure that they don't think we are being charged with filing delinquent returns. That is the only thing I want to eliminate from their mind.

THE COURT: I think that will be quite clear when they hear my charge. I don't think they are going to get into that.

MR. BENDER: All right.

THE COURT: Request number 10, which is denied except as charged, I think that's a quesion of circumstantial evidence which they can consider. I don't think I need to make much point on that.

MR. BENDER: The question is the burden of proof.

THE COURT: I will cover the burden of proof all right. Request number 11, this involves this exclusion versus deduction theory, I take it, is that right?

MR. BENDER: It also involves the question whether or not there was any evidence in the record to indicate that Mr. Nathan could have used any of this cash for business purposes. The witness Mazzurco testified --

THE COURT: I think they have got to consider that on the circumstantial evidence. They have got the checks. I think that's purely a question for them to consider. I think that's why they are there. Request number 12, which I am not sure I understand, asks me to talk about constructive dividends and all that.

MR. BENDER: The government contends that the checks that were cashed by Mr. Nathan in 1969 and '70 were chargeable as income to the corporation and then as a constructive -- receipt of a constructive dividend to him on his individual tax returns.

THE COURT: Again that's a question, is the jury going to be worrying about constructive dividends and all that kind of thing? I hope not.

MR. BENDER: I think in order for them to understand what that means there has to be a basis of fact from which they can exclude that there was a constructive dividend received. For example, it could be that he paid out the cash as a conduit, that it didn't inure to his own benefit.

THE COURT: You are going to tell them that. I suppose, but I don't quite see that I have to charge it. I will mark it denied except as charged, but I don't think I will charge anything about constructive dividend. Request number 13 is respondeat superior, I will cover that.

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find that Mr. Edwards is indeed an accountant who knew what his duty was and knew what his responsibility was to walk away from a situation where records were not being properly prepared and Mr. Katz is not someone, and perhaps he is a little bit ashamed of that, perhaps he is trying to help Mr. Nathan out somewhat. Has there been any suggestion, ladies and gentlemen, of any reason whatever, any conceivable motive that Mr. Edwards has to inconvenience himself, to come back to this trial and testify in the manner that he had. Absolutely zero, ladies and gentlemen.

The government submits that you should weigh that very carefully in your minds, the fact that Mr. Edwards has no reason whatever for in any way deflecting his testimony one way or another, and if you think that Mr. Edwards' affidavit is in some way helpful to Mr. Nathan, I suggest you take that into the jury room and you look at what Mr. Edwards said before he even had an opportunity to review his file in this case. The defense says maybe Jack Nathan didn't really get the money, ladies and gentlemen.

First of all, the government has traced it right into his pockets, ladies and gentlemen. It is pretty obvious he got the money.

Secondly, ladies and gentlemen, there is no proof whatever that this money was used for any other purpose.

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THE COURT: What do you want me to say to the jury, that it is stipulated that the place of business was in the Southern District of New York?

MR. BENDER: Something like that, that there is a requirement that the returns have to be filed in the Southern District and there is no dispute about it, but I have to tell you that it's an issue to be decided, but it is not disputed.

THE COURT: No, it isn't an issue.

MR. WOHL: To tell the jury there isn't a dispute?

THE COURT: In other words, that the office where these records were is in the Southern District of New York.

MR. BENDER: There is no dispute about it, but you have to find it as a fact.

MR. WOHL: Also if they are prepared or caused to be prepared in the Southern District.

THE COURT: I will go over that.

MR. BENDER: May I ask your Honor -- I don't want it to appear that I have waived any of my requests. The only reason I did mention this is because you did deny them except as charged. I think the jury should be told that if they find from the evidence that the cashed checks were in fact when received by the defendant used by him for perfectly

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ordinary and necessary expenses and they equal the amount of the $200 cashed checks, then the Government has failed to prove its case.

THE COURT: I just think that's an element. I think the evidence is in. You talked to them about that. I don't think I need go into that, but you have an exception.

MR. BENDER: All right. Do you think we ought to tell the jury that there is no charge in the case about the late filing of the returns?

THE COURT: No. That's just going to confuse them. I think I was trying to be very clear as to what the charges were.

MR. BENDER: In view of your statement about the fact that the reason why Congress passed Section 7260(1) which I don't find fault with --

THE COURT: As a matter of fact, you said as much in your summation.

MR. BENDER: I think so, but I also said something else, namely that the mere fact that he signed the return doesn't mean that he knows it's false.

THE COURT: I think I covered that rather clearly.

MR. BENDER: I have one other -- just two things.

112
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1633
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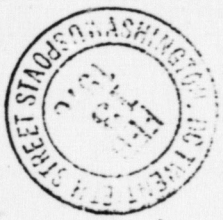

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receipt
Nathan Brief

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 75-1421

UNITED STATES OF AMERICA,

Appellee,

v.

JACK NATHAN,

Appellant.

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of February 1976 two copies of the "Brief for Appellant" and one copy of the "Appendix" were served by mail, first class postage, pre-paid on:

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